IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 530 OF 1979

M/s. Devidayal Sales Pvt.
Ltd., .. Plaintiffs.

vs.

State of Maharashtra .. Defendants.

Mr. Girish Desai with Miss Rupal Narialwala
i/by M/s. Gordhandas & Fozdar
for plaintiffs.
Mr. Denzil D'mello, AGP for defendants.

CORAM : S.U. KAMDAR, J.
DATE : 24th March, 2006.

ORAL JUDGMENT :

. The present suit is filed for recovery of a sum of Rs. 2,56,560.00 with further interest on the Rs. 2,48,910.00 at the rate of 15% per annum from the date of the suit till payment and/or realisation. Some of the material facts of the present case briefly stated are as under :-

2. Sometime in or about March 1973 the defendants through the Directorate of Industries

(Central Stores Purchase Organization), Sachivalaya, Bombay, invited tenders for supply of diverse quantities of Endrin 20% E.C. Carberyl 10% and Carbaryl 50% W.P. under a tender No. Pur/1772/13775/B published in Maharashtra Government Gazette dated 22.3.1973. The plaintiffs by their letter dated 6.4.1973 made an application for supplying the aforesaid material. The quantities which were required to be supplied is 80,000 liters Endrin 20% E.C. at the rate of 21.90 per litre, 150 M.T. Carbaryl 10% Dust for and at the price of Rs. 3,250/- per M. Ton and 25 M. Ton Carbaryl 50% W.P. at the rate of Rs. 16,950/- per M. Ton. Pursuant to the offer given by the plaintiffs to supply the said quantities, the said offer was accepted. By the said letter the plaintiffs also proposed that 90% of the price of the goods to be supplied should be paid against the dispatches of the goods and the balance of the 10% of the price to be paid on the fulfilment of the terms and conditions of the tender document. The plaintiffs by a further letter dated 16.4.1973 addressed to the Government offered to supply additional quantity of 850 M. Ton of Carbaryl 10% Dust from 15.5.1973 to 30.5.1973 and further quantity of 500 M. Tons thereafter upto 30.6.1973. The defendants by their letter dated 26.4.1973 accepted the plaintiffs offer for supply of 80,000 liters of Endrin 20% E.C. (I.C.I. Specification) duly packed in one litre packing at

the rate of Rs. 21.90 per litre exclusive of taxes. It also accepted the offer to supply 150 M. Tons of Carbaryl 10% Dust packed in 50 Kgs. packing at the price of Rs. 3,250/- per M. Ton. exclusive of taxes and 25 M. Tons Carbaryl 50% W.P. packed in 50 grams packing at the rate of Rs. 16,950/- per M. Ton taxes extra. Under the said four acceptance letters the delivery period was stipulated as under :-

> By a letter dated 30.5.1973 the defendants asked the plaintiffs to supply 80,000 liters of Endrin 20% E.C. was to be effected by 30.5.1973. Similarly, 150 M.T. Carbaryl 10% Dust was also to be effected on or before 30.5.1973 and 25 M. Ton Carbaryl 50% W.P. was to be effected on or before 30.5.1973.
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> By two further letters dated 5.6.1973 and 2.7.1973 the defendants placed the contract for further supply of 5000 liters of Endrin 50% E.C. in one liter packing and 25 M. Tons Carbaryl 50% W.P. in 500 grams packing. Delivery was to be effected on or before 30.5.1973 and 2.7.1973. Further quantity of 10,000/- liters Endrin 20% E.C. was placed for supply which was to be effected on or before 30.7.1973.

> The defendants thereafter by a letter dated 6.7.1973 placed order for 9000 M. Tons of Carbaryl 10% Dust delivery of which was to be effected in three consignments of 3000 M. Tons each. Each of the said consignments were to be delivered on 31.3.1973, 31.8.1973 and 31.9.1973. Similarly in respect of 50% W.P. also order for additional quantity was placed on 6.7.1973 which was for 75 M. Tons which was to be effected in three instalments of 25 M. Tons each on 31.7.1973, 31.8.1973 and 31.9.1973."

3. It is the further case of the plaintiffs that pursuant to the said contract, the plaintiffs effected delivery of the said goods from time to time to the defendants and the defendants have made payments from time to time in respect of the said goods. In respect of the aforesaid four contracts which have been executed, the plaintiffs have also executed necessary bank guarantees. In para 8 of the plaint the total quantities which were supplied in respect of each of the said acceptance letters and the amount payable by the defendants in respect thereof are set out. It is the case of the plaintiffs that in respect of 95,000 liters of Endrin 20% EC the total claim of the plaintiffs comes to Rs. 20,80,500/-. However, as against the

said claim the plaintiffs have received an amount of Rs. 20,44,275.93 leaving behind the balance of Rs. 36,234.07. In respect of the other goods, namely 373 M. Tons of Carbaryl 10% Dust the plaintiffs have received Rs. 1,13,022.21 less and in respect of supply 72 M.T. of Carbaryl 50% W.P. the plaintiffs have received Rs. 99,663.93 less. Thus, according to the plaintiffs there is due and payable an outstanding amount of Rs. 2,48,910/-. The plaintiffs by their letter dated 12.1.1978 called upon the defendants to make payment of the said amount of Rs. 2,48,910/- and in reply thereto the defendants by their letter dated 15.9.1973 contended that they have withheld the payment of the plaintiffs of aggregate total of Rs. 67,009/- only and they have imposed liquidated damages on the plaintiffs in accordance with clause 18 of the general terms and conditions of the contract for delayed delivery of the goods.

4. In the aforesaid circumstances the plaintiffs have filed the present suit for the balance amount due and payable by the defendants to the plaintiffs of sum of Rs. 2,48,910/- with interest thereon as on the date of filing of the suit the claim of the plaintiffs comes to Rs. 2,56,560.00 and further interest on the principal amount of Rs. 2,48,910/- at the rate of 15% per annum from the date of the suit till payment and/or

realisation.

5. The defendants have filed the written statement in the present suit and have inter alia contended that the suit is barred by Law of Limitation. They have further contended that in terms of clauses 9 to 14 they are entitled to levy penalty on account of the shortage, cost of samples as well as in respect of delay in delivery of the products. In that view of the matter, they have contended that the defendants have deducted the amount due and payable to them towards the said loss suffered. The defendants have contended that the amount is liable to be deducted by virtue of the liquidated damages as per the clause as contained in the contract between the parties.

6. On the aforesaid contentions of the parties, the issues were framed by the learned Single Judge by order dated 7.10.1996 which are as under :-

1. Whether the suit as framed is misconceived and not maintainable and therefore, liable to be dismissed with cost as alleged in paragraph 1 of the Written Statement?

2. Whether the suit is liable to be dismissed for want of Leave under Clause XII of the

Letters Patent by the Plaintiffs as alleged in paragraph 2 of the Written Statement?

3. Whether the suit is barred by Law of Limitation as alleged in paragraph 3 of the Written Statement ?

4. Do the Plaintiffs prove that Defendants committed breach of terms and conditions of the contract in the matter of issuance of delivery instructions of the contracted goods as alleged by the Plaintiffs in Plaint?

5. Do the Defendants prove that Plaintiffs committed any breach of the suit contract as alleged by them in paragraph 10 of the Written Statement ?

6. Do the Plaintiffs prove that Defendants committed any breaches of the suit contract by failing to remit to the Plaintiffs the purchase price of the contracted goods supplied by the Plaintiffs to the Defendants as per their instructions ?

7. Do the Plaintiffs prove that they supplied and delivered to the Defendants, goods of the contracted quality and quantity, value

of Rs. 67,009/- as alleged by them in the Plaint ?

8. Do the Plaintiffs prove that Defendants are entitled to deduct a sum of Rs. 1,32,892.50 by way of liquidated damages as alleged by them ?

9. Are the Plaintiffs entitled to recover a sum of Rs. 67,009/- as per particulars of claim annexed to the Plaint together with further interest on the principal sum of Rs. 67,099/- at the rate of 15% p.a. from the date of filing of the Suit as alleged by the Plaintiffs ?

10. To what reliefs the Plaintiffs are entitled?

11. What decree ? What order ?

7. The matter was referred to the Commissioner for recording evidence between the parties. The plaintiffs have examined one witness and the defendants have also examined one witness. Documents have been filed. In so far as the documents of the plaintiffs are concerned, they are marked Exhibit A collectively which consists of correspondence, invoices, delivery challans, etc.,

The defendants have also filed documents which are 29 in number being D1 to D29. There is also oral evidence led by both the plaintiffs and the defendants in respect of the aforesaid controversy in the present suit.

8. The learned counsel appearing for the plaintiffs has contended that the plaintiffs are entitled to payment of the balance amount because the defendants have not made payment of the entire amount. The learned counsel for the plaintiffs has further submitted that the plaintiffs have complied with their obligations under the terms and conditions of the contract and effected delivery of the goods in accordance with the terms and conditions of the contract and, therefore, the defendants were not eligible and/or entitled to levy any claim for penalty or damages. The learned counsel for the plaintiffs has taken me through the oral evidence between the parties and has contended that on the basis of the oral evidence he has been able to establish that the goods are duly delivered and that the defendants are not entitled to claim any liquidated damages. He has further contended that in any event, the defendants have not able to establish delay in delivery and, therefore also there is no question of any penalty being imposed on the plaintiffs and/or claiming any liquidated damages under clause 18 of the said contract.

9. On the other hand, the learned counsel appearing for the defendants has taken me through each of the said agreements and under each of the said agreements the delivery schedules in respect of the said goods has been set out as under :-

Name of the Firm	Name of the pesticides	Quantity	Delivery period.
M/s. Devidayal (Sales Pvt.Ltd.)	Endrin 20% E.C.	80000 Ltrs in one liter pack.	30.5.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	150 M. Tons. in 50 k.g. pack.	30.5.73
M/s. Devidayal (Sales Pvt.Ltd.)	Garbaryl 50 per cent WP	25 M.Tons. in 500 gms. pack.	30.5.73
M/s. Devidayal (Sales Pvt.Ltd.)	Endrin 20% E.C.	5000 Ltrs. in one liter pack.	30.6.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 50% W.P.	25M.T. in 500 gms. pack.	30.6.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	300 M.T. in 50 kg.	31.7.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	300 M.T. in 50 kg.	31.8.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	300 M.T. in 50 kg.	31.9.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 50% W.P.	25 M.T. in 500 grm. pack.	31.7.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	25 M.T. in 500 grm pack.	31.8.73
M/s. Devidayal (Sales Pvt.Ltd.)	Carbaryl 10% Dust.	25 M.T. in 50 grm.	31.9.73

pack.

The same is forming part of Exhibit A which are four letters namely dated 30.5.1973, letter dated 13.6.1973, letter dated 15.7.1973 and letter dated 6.7.1973. Under each of the said contract, the delivery was stipulated by each of the respective dates in respect of each of the said items. The learned counsel appearing for the defendants has taken me through the invoices which are forming part of Exhibit A and the goods which are delivered are mentioned in each of the invoices and the date of the delivery is mentioned in the invoices which are produced by the plaintiffs themselves which indicates delay in delivery of the goods. The learned counsel for the defendants has also drawn my attention to the three tables which were before the Commissioner giving break up and details of each of the consignments of delay in delivery and the quantum of penalty charges. He has also drawn my attention to the penalty in respect of the non-supply as well as short supply of the material. He has also claimed penalty in respect of sample charges. He has thus contended that no amount is due and payable by the defendants to the plaintiffs.

10. Now turning to the question of liquidated damages, the learned counsel for the plaintiffs

fairly conceded that clause 18 of the contract provides for penalty or liquidated damages on delayed delivery or non-delivery but does not contemplate any claim of liquidated damages in respect of the non-supply of samples. The learned counsel for the plaintiffs has not been able to demonstrate from any of the documents or any of the record that there is a right in favour of the defendants to claim any amount towards the damages arising out of non-delivery of samples. Not only that even on record there is no evidence produced by the plaintiffs to show that even the samples were not delivered or that there was an obligation on the part of the plaintiffs to deliver the said samples. In view thereof, the claim for sample charge as raised in the calculations tendered in form three tables by the defendants is required to be rejected and the same is accordingly rejected.

11. Now turning to the claim of non-supply or short-supply of the delivery of the goods, the defendants have not been able to establish from the material and evidence on record to indicate short delivery of goods in respect of any particular consignment or that there has been a non-delivery or short delivery of the goods. The claim for damages can be levied or the question of non-payment of the price of the goods by adjusting the claim towards damages can arise only after the

defendants are able to demonstrate that in fact there has been a non-delivery of the material and that the plaintiffs are claiming amount in respect of the goods which are not delivered by him. The claim of the plaintiffs is based on the invoices which are issued by the plaintiffs in respect of the goods sold and delivered and no claim has been made in respect of the goods which are not supplied. If the claim of the plaintiffs is in respect of the non-delivery of the goods or short delivery of the goods then not only the defendant must establish that there has been in fact non-delivery or short delivery of the goods but has to further establish that they are entitled to damages. Quantum of damages also is required to be established and for establishment of such quantum of damages the defendants have to demonstrate that they were required to procure the said item from the open market and the amount of the difference has been claimed by them as and by way of withholding of the price of the goods sold and delivered by the plaintiffs. It is well settled that the claim for non-delivery or short delivery has to be based on the principles of mitigation of losses by the defendants even if right to claim damages is established. In the present case neither the defendants have been able to establish that there has been in fact any non-delivery or short-delivery of the goods nor they have been able

to establish the quantum of damages. In view thereof the said claim for non-delivery and short-delivery is required to be rejected. In the present case the learned counsel for the defendants has failed to show any evidence on the record establishing non-delivery or short-delivery of the goods. In fact he has fairly conceded that it is not possible for him to identify any particular consignment which is not delivered or where there is short delivery.

12. This leads me to the last contention whether the defendants are entitled to liquidated damages in respect of delay in delivery of the goods. From the evidence which is on record, it is clear that there was a time period and delivery period prescribed in the contract between the parties. It is also clear from the invoice and the date of delivery mentioned therein that there has been substantial delay in delivery of the goods of a substantial quantity of goods. Clause 18 of the contract provides for levy of damages and penalty in an event if there is a delay in delivery of the goods. Said clause 18 of the contract reads as under :-

(18) Penalty.-- In case, the contractors fail to deliver the material or any consignment

thereof, within the contracted period of delivery or in case the material is found not in accordance with the prescribed specifications and/or approved sample, the Secretary, Agriculture and Co-operation Department shall be entitled at his option to take any one or more of the following steps :-

(a) to recover from the firm as liquidated damages a sum equivalent to 1/2 per cent, of the price of the undelivered material at the stipulated rate for each week or part thereof during which the delivery of such material may be delayed subject to a maximum limit in the case of an order not exceeding Rs. 1 lakh in value of 10 per cent, and in the case of an order exceeding Rupees one lakh in value, 5 per cent of the stipulated price of the material so undelivered. Such penalty is to be deducted always by the consignee from the bill of the firm/contractor."

(b) .....

(c) .....

In the light of the aforesaid clause and in the light of the fact that there has been delay in delivery of the goods which even the plaintiffs have not seriously disputed, I am of the opinion that the defendants were right and justified in levying the amount claimed as and by way of liquidated damages towards delay in delivery of the goods. The claim as per the defendants themselves in respect of the delay in delivery of the damages comes to an amount of Rs. 88,807.45. Thus, the defendants were right and justified in withholding the amount to the extent of Rs. 88,807.45. In so far as the plaintiffs are concerned, in view of the fact that the delay in delivery of the goods has been established on evidence and that the plaintiffs have not disputed the said fact, the said claim will have to be decreed against the claim made by the plaintiffs in the present suit. In the light of the aforesaid facts and circumstances, I answer the issues which are framed as under :-

(i). In so far as issue no. 1 is concerned, the answer to the said issue is in the negative.

(ii). In so far as issue nos. 2 and 3 are concerned, neither of the parties has pressed the said issues.

(iii). In so far as issue no. 4 is concerned, I answer issue no. 4 in the affirmative to the extent that the defendants have not made payment in respect of the balance of the price of the goods sold and delivered after deducting and adjusting the claim in respect of delay in delivery of the goods.

(iv). In so far as issue no. 5 is concerned, I answer the same in the affirmative that the plaintiff has committed breach in effecting timely delivery as per the contract and thus there is delay in delivery of the goods. Consequently the defendants are entitled to damages in respect thereof.

(v). In so far as issue no. 6 is concerned, I am of the opinion that answer to issue no. 6 is covered by answer to issue nos. 4 and 5.

(vi). In so far as issue nos. 7, 8 and 9 are concerned, the answer to the said issues is that the plaintiffs are entitled to the sum of Rs. 1,60,102.55. In so far as interest is concerned, the defendants will be liable to make payment of interest at the rate of 9% per annum from the date of the suit till payment and / or

realisation.

12. There shall be decree accordingly in favour of the plaintiffs and against the defendants. The suit is decreed accordingly. However, there shall be no order as to costs.